FILE COPY

Supreme Court, U. S.
FILED
MAR 17 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-841

ECLIPSE FUEL ENGINEERING CO.,
Petitioner,

vs.

MAXON PREMIX BURNER COMPANY, INC.,
Respondent.

PETITION FOR REHEARING (RECONSIDERATION)

NORMAN H. GERLACH,
105 West Adams Street,
Chicago, Illinois 60603,

LOUIS ROBERTSON,
DARBO, ROBERTSON & VANDENBURGH,
P. O. Box 670,
Arlington Heights, Illinois 60006,
Attorneys for Eclipse Fuel Engineering Co., Petitioner.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-841

ECLIPSE FUEL ENGINEERING CO.,
Petitioner,

vs.

MAXON PREMIX BURNER COMPANY, INC.,
Respondent.

PETITION FOR REHEARING (RECONSIDERATION)

Eclipse Fuel Engineering Co., the original petitioner, hereby petitions for rehearing (reconsideration) of the denial of the petition for certiorari.

An affidavit offered in the Court of Appeals after its decision shows that during the appeal (about June 1972) petitioner changed its burner to have uniformly sized apertures which the District Court had held not to infringe. Unfortunately that determination was voided on appeal, on the ground that "Maxon should not be prevented from ever attempting to show that a burner like the 1963 prototype would infringe . . ." (Orig. Pet. p. A-52). Now Maxon has charged Eclipse's new, unadjudicated, form to infringe. Eclipse has filed a Civil action against Maxon seeking declaratory judgment as to this new form and as to a now-scheduled further departure

from the patent in suit. Maxon has so far resisted Eclipse's request to give clearance as to this scheduled form. Maxon asserts res judicata as to validity, even though resulting only from court-ruled waiver. The public interest can be served if this Court makes certain that validity be determined in this suit. It is apparent now that the controlling reason of the Court of Appeals for not letting validity be tried ("conservation of judicial time and limitations on expensive litigation") can not be achieved. In the same civil action Eclipse seeks relief from judgment and seeks anti-trust treble damages based on fraud on the Patent Office, and on various deceptions of the courts by Maxon, some of which are set forth in the original petition here, especially pages 18 to 20.

The new civil action has been assigned to the district judge who tried the original action, and against whom the deceptions mentioned were successful. That difficult posture of Eclipse is made more difficult by the attitude of this district judge shown by the following excerpt from a transcript of proceedings before him on February 23, 1973 (nominally in the new civil action 72 C 2942) concerning this Court's denial:

> THE COURT: I would think they didn't think there was any merit in anything you said, otherwise they would have granted the cert[iorari]."

It cannot be assumed that the District Judge is so unaware of such cases as *United States* v. *Carver*, 260 U. S. 482 that citing them to him will surely overcome his present attitude. This same District Judge has just published (in the February American Bar Association Journal (p. 106) an admirably frank confession of lack of confidence in himself in patent litigation. Unfortunately, the claim of great care he included in finding 8 (white vol. p. 474) gave no similar clue to the Court of Appeals, which relied heavily on him in affirming infringement.

Another point on which the original petition here could not comment is the filing of an opposing brief which did not deny a single allegation of the petition (except public importance), not even allegations of sham and other misconduct by Maxon. It is submitted that a very bad precedent is established if this Court lets a patentee, who chose not to deny the serious charges in the petition, escape review simply by saying that it is not of sufficient public importance for this Court to act.

An affidavit offered in the Court of Appeals establishes great public interest in that there is no other burner on the market which could be substituted for the Eclipse burners in the products of some of the manufacturing customers of Eclipse. Eclipse burners are manufactured under its own patent and have important advantages over Maxon burners.

If this Court has a $10,000 requirement, it is many-times met. The security defendant has deposited with the District Court is $125,000. The period of accounting extends back to 1964, almost 4 years before the notice of infringement. The defendant is a modest corporation (about 260 employees).

Petitioner is quite likely to be unable to protect this public interest or to undo the deception of the courts below without at least a modicum of help by this Court. Because serious allegations were not denied, summary relief can be granted easily and without any greater public importance than is here. Even *denial of the petition* with an unprecedented suggestion that in the new civil action the District Court carefully consider the charges here undenied (and the question of validity if Maxon persists in broadening its claims to cover new forms exempted by its previous arguments) would help.

Without some action by this Court (which could easily follow initiation by any individual justice), Eclipse's most

strenuous continuing efforts may fail to overcome a shameful injustice on a matter of great public interest.

Respectfully submitted,

NORMAN H. GERLACH,
105 West Adams Street,
Chicago, Illinois 60603,

LOUIS ROBERTSON,
DARBO, ROBERTSON & VANDENBURGH,
P. O. Box 670,
Arlington Heights, Illinois 60006,
Attorneys for Eclipse Fuel Engineering Co., Petitioner.

CERTIFICATE.

The undersigned counsel for Petitioners herein certifies as follows: This Petition is presented in good faith and not for delay, and will cause no delay. It is restricted to intervening circumstances of substantial and controlling effect, including developments in continuing litigation between the parties and to other substantial grounds available to Petitioners but not previously presented.

NORMAN H. GERLACH

Chicago, Illinois